tion.[9] On the other hand, any regulation is in effect prohibition of all ways of doing business except those in accordance with the regulations. But if the regulation is proper, no one has a right to do business except in accordance therewith.[10]

To require those without the purview of existing laws to come within it is obviously not the only way to control the outsiders; for the very circumstances which would validate compulsory incorporation authorize the regulation of partnerships and individuals, by extending the scope of the existing laws [11] to include them. Moreover, compulsory incorporation under the existing laws is open to the serious objection that it prohibits banking by individuals or by firms of two. The principal case, however, points out two dangers of private banking, to eliminate which would require more than an extension of the existing regulations: the subjection of the deposits to claims of the individual banker's outside creditors, and the possible interruption of business on his death. Doubtless these dangers could be prevented by some form of additional regulation which would not have the effect of prohibiting private banking. But in view of the ease with which an individual can obtain two associates for the purpose of incorporation, while himself retaining full control of the business, the restriction would seem to be theoretical rather than actual. It is therefore submitted that the principal case is correct [12] in not regarding compulsory incorporation as such an unreasonable means of regulation as to be unconstitutional.[13]

LICENSE AND WAIVER OF BREACH OF CONDITION IN LEASES. — A landlord may release his right of entry for a breach of condition by assent to the breach either prior or subsequent thereto; *i. e.*, by license or waiver.[1] The effect of this assent on the right to enter for subsequent breaches has long been a mooted question. Purporting to follow the cases which held that a condition could not be apportioned,[2] *Dumpor's Case*[3] decided in 1603 that a license to assign "to any person or persons, *quibuscunque*," destroyed a condition against assignment, so that an assignee could assign without license. Although this decision might well have been confined to licenses to assign to "any person," it was not so restricted; and the next case to consider the question held that a condition against assignment was

[9] Smyth *v.* Ames, 169 U. S. 466.

[10] Dent *v.* West Virginia, 129 U. S. 114. Thus it has been held unobjectionable to require all bankers to submit to inspection (Blaker *v.* Hood, *supra*); to make it criminal for a banker to receive a deposit after knowledge of insolvency (Meadowcroft *v.* People, *supra*); to require a minimum amount of capital to be invested in certain ways; to restrict the use of the word "bank" to those who comply with certain conditions (State *v.* Richcreek, *supra*).

[11] See FREUND, POLICE POWER, § 364.

[12] State *ex rel.* Goodsill *v.* Woodmansee, 1 N. D. 246, *acc.* *Contra*, State *v.* Scougal, 3 S. D. 55. *Cf.* Commonwealth *v.* Vrooman, 164 Pa. St. 306; Commonwealth *v.* Carter, 132 Mass. 12.

[13] But *cf.* 23 HARV. L. REV. 292.

[1] Weisbrod *v.* Dembosky, 25 N. Y. Misc. 485; Goodright d. Walter *v.* Davids, Cowp. 803. See Pennant's Case, 3 Co. 64 *a*.

[2] Leeds *v.* Crompton, 1 Rol. Abr. 472, Pl. 7; Winter's Case, Dy. 308 *b*; Anon., Dy. 152, pl. 7. See Wright *v.* Burroughes, 3 C. B. 685, 699.

[3] 4 Co. 119 *b*; s. c. Cro. Eliz. 815.

destroyed by one license to assign to a definite person, followed by an assignment to that person.[4] These decisions appear to have been acquiesced in as settling the English law with respect to the effect of a license to assign,[5] but the harshness of the rule led to its abrogation by statute in 1859.[6] In the United States it is difficult to state the effect of a license.[7] There seem to be no clear decisions;[8] but there are many *dicta* expressly recognizing *Dumpor's Case* as an authority for the doctrine that one license to assign destroys a condition against assignment.[9] This doctrine is probably the American law. There seems, however, no ground for extending it to conditions against other acts,[10] nor to covenants,[11] though there are statements in some of the treatises and cases to the contrary.[12]

The law as to the effect of waiver is in a more satisfactory state. If a lessor by his conduct subsequent to the breach, and with notice thereof, recognizes the continuance of the tenancy, he is barred from entering for that breach.[13] This is probably on the basis of a loose estoppel. But a tolerance of past breaches is not a license of future ones, and therefore does not destroy the condition.[14] Such is the holding of a recent case. *Beckenbach* v. *Harlow*, 31 Oh. C. C. 496 (Nov., 1909). This doctrine is applied to conditions against underletting,[15] and against objectionable uses of the premises,[16] etc.; *i. e.*, conditions susceptible of more than one breach. A condition against assignment would appear equally subject to several breaches by successive assignments. Statements are found in the cases, however, that a waiver of an assignment may have the effect of a license, and destroy the condition altogether.[17] There seems to be no valid distinction between conditions capable of several breaches by one tenant, and those susceptible only of distinct breaches by successive tenants.[18] To make such a distinction would force a landlord, for fear of losing his right to object to subsequent assignments, to enter forthwith upon finding

[4] *Per* Lord Eldon in Brummel *v.* Macpherson, 14 Ves. 173. It is worthy of note that in Anon., Dy. 152, pl. 7, cited as an authority by Lord Eldon for the position that an assignee by permission is not bound by the condition, the majority of the court went the other way.

[5] See 3 BYTHEWOOD, CONVEYANCING, 3 ed., 685, 686; Doe d. Boscawen *v.* Bliss, 4 Taunt. 735.

[6] 22 & 23 Vict., c. 35, §§ 1, 2 (Lord St. Leonard's Act).

[7] See 7 AMER. L. REV. 616; 1 WASHBURN, REAL PROPERTY, § 649; 1 TIFFANY, REAL PROPERTY, 176; 1 SMITH'S LEADING CASES. 9 Amer. ed., 137.

[8] See citations in note 7, *supra;* Pennock *v.* Lyons, 118 Mass. 92; Chipman *v.* Emeric, 5 Cal. 49; Kew *v.* Trainor, 150 Ill. 150; North, etc. Co. *v.* Le Grand Co., 95 Ill. App. 435, 464.

[9] Siefke *v.* Koch, 31 How. Pr. (N. Y.) 383; Wertheimer *v.* Hosmer, 83 Mich. 56, 61; Gazlay *v.* Williams, 210 U. S. 41; s. c. below, 147 Fed. 678, 682. But see North, etc. Co. *v.* Le Grand Co., *supra.*

[10] See 7 AMER. L. REV. 262, 633; 1 SMITH'S LEADING CASES, 11 Eng. ed., 45; German-American Savings Bank *v.* Gollmer, 102 Pac. 932 (Cal.).

[11] But see Reid *v.* John F. Wiessner Brewing Co., 88 Md. 234. *Contra*, Dakin *v.* Williams, 17 Wend. (N. Y.) 447. And see 12 HARV. L. REV. 272.

[12] See, *e. g.*, 1 TAYLOR, LANDLORD AND TENANT, § 286; GOODWIN, REAL PROPERTY, 84.

[13] Arnsby *v.* Woodward, 6 B. & C. 519.

[14] Doe d. Boscawen *v.* Bliss, 4 Taunt. 735; Jones *v.* Durrer, 96 Cal. 95.

[15] Doe d. Boscawen *v.* Bliss, *supra.*

[16] Farwell *v.* Easton, 63 Mo. 446; Doe d. Ambler *v.* Woodbridge, 9 B. & C. 376.

[17] Heeter *v.* Eckstein, 50 How. Pr. (N. Y.) 445; Lloyd *v.* Crispe, 5 Taunt. 249, 257.

[18] But see 1 SMITH'S LEADING CASES, 11 Eng. ed., 45; German-American Savings Bank *v.* Gollmer, 102 Pac. 932 (Cal.).

an assignee in possession, though the latter might be a very desirable tenant. Such a result has nothing to commend it.

It has been held that the destructive effect upon a condition of a license to assign may be nullified by the insertion in the license of a proviso that such license shall not authorize further assignments without the landlord's assent.[19] This expedient, if recognized, deprives Lord Coke's doctrine of much of its sting. It would seem that such a proviso should be equally efficacious if inserted in the original lease; as, by a statement that "no consent to any act by license or waiver shall be deemed a consent to any subsequent act."

MARKET VALUE AS A MEASURE OF COMPENSATION. — The term "market value" is used by the courts in three distinct senses: to denote (1) current price;[1] (2) cash value;[2] (3) the measure of recovery.[3] In this last sense, the term obviously means nothing. By cash value is meant the cash sum for which the property in question could probably be sold by the owner, making reasonable efforts, and taking reasonable time to effect a sale. It is sometimes expressed as the price the property "would bring at a fair public sale, when one party wanted to sell and the other to buy."[2] It would seem less confusing to confine the term "market value" to the current price in the vicinity at the time the property is to be valued. It is generally so confined when chattels are the subject of valuation.[4]

But assuming that there is no current price, the determination of value becomes a complicated question. The law as to chattels is fairly definite to the effect that the cost of reproduction, or the original cost with deductions for depreciation, where practicable, shall govern.[5] Strictly there can be no current price on a tract of land, because there are no two tracts exactly alike. Consequently, in the majority of condemnation proceedings courts are driven to determine market value in the sense of cash value. The test of cash value is the bid of a reasonable willing buyer who has in mind certain elements of valuation, such as prices paid at sales of similar property,[6] any use to which the property is reasonably adapted,[7] original

[19] Kew *v.* Trainor, 150 Ill. 150; Springer *v.* Chicago, etc. Co., 202 Ill. 17. See Wertheimer *v.* Hosmer, 83 Mich. 56. But see 3 BYTHEWOOD, CONVEYANCING, 3 ed., 685, 691; Mason *v.* Corder, 7 Taunt. 9, 11 n.

[1] See Dana *v.* Fiedler, 12 N. Y. 40; Cliquot's Champagne, 3 Wall. (U. S.) 114.

[2] See Lawrence *v.* Boston, 119 Mass. 126.

[3] See Reed *v.* O. & M. Ry. Co., 126 Ill. 48.

[4] See cases cited in note 5, *post*.

[5] Mather *v.* American Express Co., 138 Mass. 55 (plans of a house); Starkey *v.* Kelly, 50 N. Y. 677 (household furniture). See Simpson *v.* N. Y., N. H. & H. R. R., 38 N. Y. S. 341 (wearing apparel); Heald *v.* McGowan, 15 Daly (N. Y.) 233, affirmed, 117 N. Y. 643 (electrotype plates); Wamsley *v.* Atlas Steamship Co., 50 N. Y. App. Div. 199, reversed on another ground, 168 N. Y. 533 (photograph negatives). Conversely, if there is a current price, evidence as to cost, etc., is inadmissible. Althouse *v.* Alvord, 28 Wis. 577.

[6] Denham *v.* Dunbar, 103 Mass. 365; Patch *v.* Boston, 146 Mass. 52. The similarity between the properties must be affirmatively shown. Cummins *v.* D. M. & St. L. Ry. Co., 63 Ia. 397. In Pennsylvania evidence of sales of similar property is inadmissible. Railroad Co. *v.* Patterson, 107 Pa. St. 461. See also Stinson *v.* C., St. P. & M. Ry., 27 Minn. 284.

[7] Boom Co. *v.* Patterson, 98 U. S. 403. A recent case strikingly illustrates that an